United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1421

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v. Docket No. 76-1421

LOUIS WATSON,

Appellant.

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P/S

REPLY BRIEF FOR APPELLANT LOUIS WATSON

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REPLY BRIEF FOR APPELLANT LOUIS WATSON

POINT I

THE RULE 20 EXCLUSION APPLIES TO TRIAL ONLY, NOT TO THE GOVERNMENT'S READINESS FOR TRIAL.

Rule 3 of the District's Prompt Disposition Rules sets forth requirements for when certain defendants must be tried. It is concerned with trial only -- nothing else. The Government answers an argument we never made about whether Watson was in "custody" (GBr 18-20). That answer passes the point that when Rule 3 (b)(1) speaks of the "times set forth above" in connection with a Rule 20 disposition, those times are trial times, not readiness for trial times. (We annex the full text of the Plan's Rules 3, 5 and 6 in the Appendix to this Brief).

The Government cites no authority for the proposition that the plain language of Rule 3 should be disregarded, and there is none. Its half-hearted assertion, moreover (GBr 20), that there should be a Rule 20 exclusion in Rule 6(a) is frivolous. Specific inclusion in Plan Rule 3 with no mention at all in Plan Rule 6 shows that Rule 20 was not intended to fall within the "pending proceedings" language of Rule 6. There were, in addition, no Rule 20 " proceedings" in this case. The Rule cperates when defendant "state[s] in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested ..." (GBr 12). No such thing occurred here.

The six month period clearly started, then, on November 25, 1975 when Watson came into federal custody (GBr 11). The district court was wrong therefore in holding that the December 4 preliminary hearing was the earliest date the six months could run even if, as it put it, "the arrest here was by state authorities" (A 30).

POINT II

THE GOVERNMENT'S READINESS IS NOT MARKED BY ITS REMARKS AT THE JUNE 16 HEARING.

The district court excluded the period after June 16,

1976 because Watson did not have counsel (729-31), not because it took any statement of the Government at the June 16 conference as a sufficient indication of readiness to come within the six months. It stated (731):

> "THE COURT: Well, I intend to exclude the entire period from the 16th because I think everything that happened there is within very tight and reasonable limits, what limits are necessary to comport with due process and fairness [to wit, assignment of counsel]."

Nor, we believe, did the Government urge until its brief in this Court (GBr 23) that it had made an oral declaration of readiness which sufficed under United States v. Pierro, 478 F. 2d 386 (2d Cir. 1973) and cases like it (GBr 23).

We have examined the June 16 transcript. The Government's Brief cites page 2 thereof, but all that happened there was that the Government answered "Ready" to the call of the case that day for pre-trial conference, in other words it was ready for the conference. Later on (p. 6), the Assistant remarked that he was "ready to go to trial at any time" but this was not an announcement of readiness. Watson asked the court for time to find an attorney. The court said it would give it to him but wanted him to understand that the time getting counsel would not count for six month purposes. The Assistant's remarks were only to re-enforce that point, as indicated by the fact that on June 28, the Government filed a written notice

stating it was then ready to go to trial provided it received five days notice of trial; and its failure below to make the point that the June 16 statement sufficed.

Even excluding, then, the fifteen days from March 29 to April 14 which are said to fall within the "proceedings" exceptions of Rule 6 (a) (GBr 22),* the Government's notice was untimely, a result which follows also even if this Court accepts the claimed oral announcement on June 16 (DBr 8), which, as we have shown, it should not.

POINT III

THIS COURT SHOULD NOT CONSIDER THE EXCLUSIONS WHICH WERE NOT DECIDED IN THE COURT BELOW.

The Government urges this Court to find exclusions which the district court refused to consider (GBr 24-25, n). These related to the period from December 19, 1975 to March 1976, when the United States Attorney for the Eastern District of Pennsylvania had turned Watson back to State custody and the

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* We adhere to our earlier point (Dbr 7) that Rule 6 (a) did not have in mind the situation in this case in which a defendant has yet to be brought before the Court because of default of the Government, and where the district court is unable to exercise any control over the case having in mind the other proceedings. Compare United States v. Bowman, 493 F. 2d 594 (2d Cir. 1974).

United States Attorney for the Southern District of New York did not know where he was.

In the event that those issues become relevant the proper course is to return the case to the district court so that it may consider and decide them first in all likelihood after a hearing, United States v. Scafo, 470 F.2d 748 (2d Cir. 1972), United States v. Valot, 473 F. 2d 667 (2d Cir. 1973) since the district court has never had before it all of the pertinent facts on the due diligence issue. The hearing it did hold explored only the Rule 20 and state proceedings exclusion. As to the rest, the only thing submitted was the Assistant's affidavit. There was no first hand testimonial exploration of the facts with the individuals actually involved.

We note in passing, however, that defendant has far more the better part of the argument on "due diligence". Watson was in federal custody in December, 1975 on a bank robbery charge far more serious than the various local charges. There was no reason why he had to be immediately turned back to state authorities since he was not serving any state sentence at the time. That is why, as the Government concedes, the Assistant here "believed that Watson ... would in due course be transported to New York" (GBr 24, n). After he was turned back to the State the U.S. Attorney was far from diligent in following up on him as weeks and weeks went by and he still had not shown up. And after finding him at Graterford and

uselessly serving the writ there, a simple oral check at Graterford would have shown to where he had been sent. Contrary to GBr 25, n, Watson's use of "Kenneth Glover" made no difference since the Government knew he was in state custody under the Glover name (GBr 6) and the National Crime Information Center showed that name for him as well (GBr 10).

Although Plan Rule 6 (d) does say that a defendant is considered "absent whenever his location is unknown" (GBr 24, n), there is an issue which should first be determined below after appropriate hearing of whether the Government can use the "absence" exception when the Government itself has been responsible for losing custody, when the Government has let weeks pass without keeping track of defendant, and when the Government has failed to take simple steps which would immediately give it knowledge of defendant's location.

POINT IV

THE INTERSTATE DETAINER AGREEMENT SHOULD APPLY TO A STATE PRISONER ON PROBATION.

Since submitting our original Brief we had reviewed further the various aspects of the Interstate Agreement on Detainers in light of the fact which the Government's Brief calls to our attention (GBr 14) that when he entered federal custody Watson was still on probation from an earlier state conviction. We have then something more than simply a "pre-trial detainee" (GBr 26).

The legislative history gives no clue to whether "term of imprisonment" in Article IV must be construed narrowly as the Government suggests (GBr 28) to exclude a defendant in Watson's position.

Neither Davidson v. State, 305 A. 2d 474 (Md. App. 1973), nor Seymour v. State, 515 P. 2d 39 (Ariz. App. 1973) helps because they decided issues only under Article III, where the prisoner triggers the trial. This case involves Article IV, where the prosecutor obtained custody from another jurisdiction and must be charged with the consequences of the Agreement unless he demonstrates that it is excluded. United States ex rel Evola v. Groomes, 520 F. 2d 830 (3d Cir. 1975). In United States v. Dowl, 394 F. Supp. 1250, 1254 (D. Minn. 1975), moreover, the Government itself argued that a delay in a federal trial while defendant was in pre-trial custody of Michigan authorities should be charged against defendant since he could have demanded an early federal trial under Article III of the Agreement. This suggests that the limitation for which the Government contends is a closer question than the Government makes out. It would be helpful, we submit, in finally judging this issue if the Government advises the Court at oral argument whether it has ever utilized the provisions of the Act to obtain custody of a state prisoner who was not serving a term (Art.IV), or recognized an obligation to give a trial to a similar prisoner who demanded one (Art. III).

Respectfully submitted,

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3. *Time Requirements for Trial of Defendants in Custody and of High Risk Defendants*

(a)(1) Trial of a defendant held in custody solely for the purpose of trial shall commence within 90 days following the beginning of continuous custody.

(2) Trial of a high risk defendant shall commence within ninety days of the determination or designation as "high risk", or within ninety days of the effective date of this plan, whichever date is later.

(b)(1) Where a defendant is apprehended outside this district and held in custody and his case is initially processed under Rule 20 of the Federal Rules of Criminal Procedure, the times set out above shall begin to run where the defendant rejects disposition under Rule 20.

(2) Where a defendant is apprehended outside this district and is held in custody (except for cases initially processed under Rule 20), the times set out above shall begin to run:

(i) Upon the beginning of the defendant's continuous custody, if the arrest was pursuant to a warrant issued on an indictment or information filed in this district;

(ii) Upon the finding and recommendation or order by a magistrate that a warrant of removal shall issue, if the defendant's arrest was not pursuant to such a warrant.

(3) Where a defendant is apprehended outside this district and is released pursuant to the provisions of

Chapter 207, Title 18, U.S.C., the times set out above shall begin to run when the defendant returns to this district.

4. *Effect of Non-Compliance*

(a) Upon the expiration of the time limits prescribed by Section 3:

(1) A defendant in custody solely because he is awaiting trial and whose trial has failed to commence through no fault of the accused or his attorney shall be released subject to such conditions as the court may impose in accordance with 18 U.S.C. 3146.

(2) A high risk defendant whose trial has failed to commence through no fault of the attorney for the government shall have his release conditions automatically reviewed by the court. A high risk defendant who is found by the court at that time to have intentionally delayed the trial of his case shall be subject to an order of this court modifying his non-financial conditions of release under Chapter 207, Title 18, U.S.C., to insure that he shall appear at trial as required.

5. *All Cases: Trial Readiness and Effect of Non-Compliance*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial

within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 6, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

6. *Excluded Periods*

In computing the time within which the government should be ready for trial under Rule 5, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) Periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The District Court shall grant such a continuance only if it is satisfied

that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(ii) the prosecuting attorney is actively preparing the government's case for trial and additional time is justified by exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other period of delay occasioned by exceptional circumstances.

7. *Retrials*

Where a new trial has been ordered by the District Court or a trial or new trial has been ordered by an Appellate Court, it shall commence at the earliest practicable time, but in any event, not later than 60 days after the finality of such order. If the defendant is to be retried following an appeal or collateral attack, the court trying the case may extend such period for a total not to exceed 180 days from the date on which the order occasioning the retrial becomes final, where unavailability of witnesses or other factors resulting from passage of time shall make trial within 60 days impractical.

8. *Demand and Waiver Provisions*

A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge